INCORPORATION BY REFERENCE.—Testamentary disposition is a matter of purely statutory authorization, requiring, with certain unimportant exceptions,[1] a writing complying with prescribed formalities of execution.[2] When, therefore, effect is given to a testamentary disposition contained in a writing which does not meet these statutory requirements, the explanation must be sought in a fiction, of which the courts may avail themselves without contravening the legislative intent. This situation is presented when a writing in this respect informal, in actual existence[3] at the time reference is made to it as a then existing writing,[4] and identified to the satisfaction of the court as the one so designated,[5] is thereby incorporated into a duly executed will or codicil, for the purpose of giving effect to the testator's intention. The courts may, not without reason, conceive the application of this doctrine of incorporation by reference to contravene the legislative intent,[6] which, rather than the testator's, is admittedly controlling as to matters of execution,[7] but a contrary interpretation, by virtue of which the doctrine has received recognition almost without exception,[8] seems preferable, in that the testator's intention is thereby effectuated, and the spirit of the statute kept inviolate by means of the narrow limits, indicated above, within which the operation of the rule is confined. Thus, by requiring the writing to have been in existence at the time of the reference, the testator is prevented from in effect reserving to himself the power of future disposition without the requisite formalities.[9] Since the will does not take effect until his death, the testator may make its operation depend upon future contingencies, even though they be under his own control,[10] and consequently change the character of his disposition, but a writing may not be relied

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[1] *I. e.* nuncupative, and in some jurisdictions, holographic wills.

[2] Redfield, Wills *263; see Habergham *v.* Vincent (1793) 2 Ves. Jr. 204; *In re* Brand (N. Y. 1902) 68 App. Div. 225; N. Y. Cons. Laws, Dec. Est. L. § 21.

[3] Goods of Dickins (1842) 3 Curt. Ec. 60; Allen *v.* Maddock (1858) 11 Moo. P. C. 427; Goods of Daniell (1882) L. R. 8 P. D. 14; Newton *v.* Seaman's Friend Society (1881) 130 Mass. 91.

[4] Goods of Dickins *supra;* Fickle *v.* Snepp (1884) 97 Ind. 289.

[5] Goods of Almosnino (1859) 1 Sw. & Tr. 508; Allen *v.* Maddock *supra;* Doe *v.* Evans (1832) 1 Cr. & Mees. 42; Goods of Mercer (1870) L. R. 2 P. & D. 91; Newton *v.* Seaman's Friend Society *supra;* see Croker *v.* Marquis of Hertford (1844) 4 Moo. P. C. 339; Smart *v.* Prujean (1801) 6 Ves. Jr. 560.

[6] Hatheway *v.* Smith (1907) 79 Conn. 506; see Bryan's Appeal (1904) 77 Conn. 241; Phelps *v.* Robbins (1873) 40 Conn. 250.

[7] Smee *v.* Bryer (1848) 6 Moo. P. C. 404; Matter of Conway (1891) 124 N. Y. 455.

[8] Jarman, Wills *98; Beall *v.* Cunningham (Ky. 1843) 3 B. Mon. 390; *In re* Plumel's Estate (1907) 151 Cal. 77; Skinner *v.* American Bible Society (1896) 92 Wis. 209; Harvy *v.* Chouteau (1851) 14 Mo. 587. See also cases cited in notes 3, 4 & 5. *Contra* New York and Connecticut cases cited in notes 30 & 6.

[9] Johnson *v.* Ball (1851) 5 De G. & Sm. 85; Goods of Lancaster (1860) 29 L. J. [N. S.] P. & M. 155; Singleton *v.* Tomlinson (1878) L. R. 3 App. Cas. 404; Thayer *v.* Wellington (Mass. 1864) 9 Allen 283.

[10] Stubbs *v.* Sargon (1838) 3 My. & Cr. 507.

upon to accomplish this, in view of the statutory requirements.[11] In demanding that the reference itself indicate that the writing was then existing,[12] parol evidence being otherwise inadmissible to prove that this was actually the case,[13] an incentive to the fraudulent violation of the rule by others than the testator is removed. But where these requirements are met, and there is a definite reference,[14] extrinsic evidence is admissible for purposes of identification.[15]

The recent case of *In re Martindale's Will* (1910) 127 N. Y. Supp. 887, held that in the absence of intention to that effect there could be no incorporation by reference, at the same time restating the New York doctrine that there can be no incorporation of unattested testamentary papers under any circumstances. This rule was laid down in *Booth* v. *The Baptist Church*,[16] which however apparently presented no proper case for incorporation. Since the court in the latter case refused to consider the facts with reference to matters of identification of the memoranda and their existence in point of time relative to the execution of the will, as unnecessary to its determination, the repudiation of the doctrine cannot be considered *obiter*. In view of the fact that previous to this decision, the doctrine of incorporation had been uniformly recognized[17] except in cases arising under the statute requiring the testator to sign at the end of the will,[18] the source of the considerations influencing the court must be sought in the principles enunciated in this body of decisions, rather than in the interpretation of the legislative intent with respect to pure cases of incorporation. In

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[11]Hartwell *v.* Martin (1906) 71 N. J. Eq. 157. It is always competent for a testator to satisfy a legacy during his life time, or to designate as legatees persons who at the time of his death should fill a certain position, and a writing may be indicated as evidencing these matters. Lawrence *v.* Lindsay (1877) 68 N. Y. 108; Robert *v.* Corning (1882) 89 N. Y. 225, 241; Dennis *v.* Holsapple (1897) 148 Ind. 297; see Williams *v.* Freeman (1881) 83 N. Y. 561; Langdon *v.* Astor's Estate (1857) 16 N. Y. 9.

[12]Goods of Mary Reid (1868) 38 L. J. [N. S.] P. & M. 1; Goods of Dallow (1866) L. R. 1 P. & D. 189; Goods of Elizabeth Watkins (1865) L. R. 1 P. & D. 19; Durham *v.* Northen L. R. [1895] P. 66; *In re* Shillaber (1887) 74 Cal. 144; Vestry *v.* Bostwick (1896) 8 App. D. C. 452; *cf.* Goods of Truro (1866) L. R. 1 P. & D. 201.

[13]Goods of Mary Reid *supra;* Goods of Dallow *supra;* Goods of Mary Sunderland (1866) L. R. 1 P. & D. 198; Goods of Kehoe (1884) L. R. 13 Ir. 13; *cf.* Goods of Truro *supra;* Goods of Smart L. R. [1902] P. 238.

[14]See cases in note 5. *Cf.* Croker *v.* Marquis of Hertford *supra;* Smart *v.* Prujean *supra;* Estate of Young (1899) 123 Cal. 337; Chambers *v.* McDaniel (N. C. 1845) 6 Ired. L. 226.

[15]Allen *v.* Maddock *supra.*

[16](1891) 126 N. Y. 215.

[17]Storm's Will (N. Y. 1878) 3 Redf. 327; Tonnele *v.* Hall (1850) 4 N. Y. 140; Dyer *v.* Erving (N. Y. 1844) 2 Dem. 160; Webb. *v.* Day (N. Y. 1844) 2 Dem. 459; Ludlum *v.* Otis (N. Y. 1878) 15 Hun 410; Matter of Nisbet (N. Y. 1886) 5 Dem. 286; see Vogel *v.* Lehritter (1893) 139 N. Y. 223; Caulfield *v.* Sullivan (1881) 85 N. Y. 153; Brown *v.* Clarke (1879) 77 N. Y. 369; but see Thompson *v.* Quinby (N. Y. 1853) 2 Bradf. 449; S. C. aff'd. 21 Barb. 107.

[18]Thompson *v.* Quinby *supra;* Matter of O'Neill (1883) 91 N. Y. 516; Matter of Conway *supra;* Matter of Whitney (1897) 153 N. Y. 259; Matter of Andrews (N. Y. 1899) 43 App. Div. 394, 162 N. Y. 1; but see Tonnele *v.* Hall *supra.*

the class of cases which involve the statute, the testator has in general attempted to put some part of his testamentary declarations upon blank spaces following his signature and spatially further removed than it from the beginning of the will.[19] Since the intention of the statute is to prevent additions to the will subsequent to execution,[20] the application of other than the physical end rule where such a possibility exists would in effect repeal the statute, leaving the courts to decide by parol evidence whether or not there had been such an addition.[21] The same considerations would seem necessarily to effect, as within the spirit of the statute, a restriction to this extent upon the doctrine of incorporation of extrinsic documents by reference. It follows that where no possibility of addition exists a proper construction of the statute should not prevent,[22] and, it is submitted has not as yet prevented,[23] an incorporation by reference, however rigidly the physical end rule may be applicable to the will intrinsically.

The influence of these decisions is apparent in a second class of cases, where reference is made to previous testamentary dispositions which were defectively executed. Although originally defective execution was curable by incorporation,[24] this effect is denied according to the modern view,[25] in contrast to dispositions which were duly executed, but are ineffective because of subsequent revocation,[26] or invalid because of temporary incompetency on the part of the testator.[27] That this contrast to the prejudice of informal writings is inexact as a matter of classification, appears from the fact that duly executed instruments are revived and republished as of the date of the instrument referring to them,[28] and are consequently construed jointly as the complete expression of the testator's will, without resort to the doctrine of incorporation.[29] The rule therefore might be stated in

[19]Matter of O'Neill *supra;* Matter of Conway *supra;* Matter of Whitney *supra.*

[20]Tonnele *v.* Hall *supra;* Matter of Blair *supra;* Matter of Andrews *supra;* Matter of Fults (N. Y. 1899) 42 App. Div. 593; but see Hitchcock *v.* Thompson (N. Y. 1875) 6 Hun 279.

[21]Matter of O'Neill *supra;* Matter of Hewitt *supra;* Sears *v.* Sears (1907) 77 Oh. St. 104; but see *In re* Swire's Estate (1909) 225 Pa. St. 188. Under a similar English statute, 1 Vict. c. 26, the result of the decisions was the same, Smee *v.* Bryer *supra;* Ayres *v.* Ayres (1847) 1 Rob. Ec. 466, and because of its stringency the statute was repealed. See Goods of Coombs (1866) L. R. 1 P. & D. 302; Goods of Birt (1871) 24 L. T. [N. S.] 142.

[22]Matter of Andrews *supra;* Dyer *v.* Erving *supra; In re* Stinson's Estate (1910) 228 Pa. St. 475; Baker's Appeal (1884) 107 Pa. St. 381; See Crossman *v.* Crossman (1884) 95 N. Y. 145.

[23]*Cf.* cases in note 18.

[24]Storm's Will *supra;* Matter of Nisbet *supra;* see Caulfield *v.* Sullivan *supra;* Vogel *v.* Lehritter *supra.*

[25]Matter of Emmons (N. Y. 1906) 110 App. Div. 701; *cf.* Booth *v.* The Baptist Church (1891) 126 N. Y. 215 and cases cited in note 18.

[26]Matter of Campbell (1902) 170 N. Y. 84; Brown *v.* Clarke *supra.*

[27]Cooke *v.* White (N. Y. 1899) 43 App. Div. 388, aff'd 167 N. Y. 588.

[28]Van Courtlandt *v.* Kip (N. Y. 1841) 1 Hill 590; Matter of Campbell *supra;* Brown *v.* Clarke *supra;* Cooke *v.* White *supra;* Matter of Miller (N. Y. 1896) 11 App. Div. 337.

[29]Van Wert *v.* Benedict (N. Y. 1849) 1 Bradf. 114; *In re* Brand *supra;* see Brown *v.* Clarke *supra;* Cooke *v.* White *supra;* Matter of Campbell *supra.*

absolute terms that there can be no incorporation by reference in New York, and yet in view of the scarcity and questionable authority of the decisions upon which the rule rests,[30] it would still seem competent for the courts to recognize the doctrine of incorporation within the limits indicated.

THE PRIORITY OF A MORTGAGE TO SECURE FUTURE ADVANCES.—While it is well established that a mortgage to secure future advances is valid as between the parties[1] and is not in itself a fraud on creditors,[2] and further that the mortgagee prevails over subsequent incumbrancers for all loans actually made prior to the time at which their liens attached,[3] there is a sharp conflict of authority on the question of priority of such a mortgage over an incumbrance intervening between the date of the instrument and the time of the loan. Where the mortgagee is under a contract to make advances, the American courts generally allow him priority over intermediate lienors irrespective of whether or not he had notice of their rights.[4] If he had no notice, this result is manifestly correct in jurisdictions which regard a first mortgage as conveying the title, since in addition to his equitable right to hold the land as security he is also grantee of the legal title and therefore should not be bound by equities.[5] The same rule is applied, however, even where a mortgage is considered as a mere lien, because of the fiction that the lien attaches at the date of the mortgage and not at the time of the loan.[6] Except on that fiction, the application of the general American rule to cases where the mortgagee had notice of the intervening incumbrance, is hard to justify in either class of jurisdictions. Inasmuch as equity compels the mortgagee to hold the property as security for the debt, and no obligation arises in favor of the mortgagee until the money is actually advanced, there being no agreement on the mortgagor's part to accept loans, it would seem that the mortgagee's rights should be postponed to those of the intermediate incumbrancers. This result is reached by the English courts, which also properly permit the mortgagee to repudiate his contract to make

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[30]Matter of Reins (N. Y. 1908) 59 Misc. 126; Booth *v.* The Baptist Church *supra;* Matter of Emmons *supra;* Matter of Sanderson (N. Y. 1894; 9 Misc. 574, and cases cited in note 18.

[1]U. S. *v.* Hooe (1805) 3 Cranch 73; Commercial Bank *v.* Cunningham (Mass. 1837) 24 Pick. 270; Bell *v.* Fleming's Executors (1858) 12 N. J. Eq. 13; Madigan *v.* Mead (1883) 31 Minn. 94; Garber *v.* Henry (Pa. 1837) 6 Watts 57; Brinkerhoff *v.* Marvin (N. Y. 1821) 5 Johns. Ch. 520; Nicklin *v.* Betts Spring Co. (1884) 11 Or. 406; *cf.* Leeds *v.* Cameron (1839) 3 Sumn. 488.

[2]Wilson *v.* Russell (1859) 13 Md. 495; Louisville Banking Co. *v.* Leonard (1890) 90 Ky. 106. See also 10 COLUMBIA LAW REVIEW 483.

[3]Lawrence *v.* Tucker (1859) 23 How. 14; McCarty *v.* Chalfant (1878) 14 W. Va. 531; Jarratt *v.* McDaniel (1877) 32 Ark. 598.

[4]Lovelace *v.* Webb (1878) 62 Ala. 271; Crane *v.* Deming (1829) 7 Conn. 387; Brinkmeyer *v.* Browneller (1876) 55 Ind. 487; Tompkins *v.* Little Rock etc. Ry. (1882) 15 Fed. 6; Brinkmeyer *v.* Heilbling (1877) 57 Ind. 435; Hyman *v.* Hauff (1893) 138 N. Y. 48; but see Tapia *v.* Demartini (1888) 77 Cal. 383.

[5]See Todd *v.* Outlaw (1878) 79 N. C. 235.

[6]See Tapia *v.* Demartini *supra.*